

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 DEPARTMENT OF TRANSPORTATION, :
4 ET AL., :
5 Petitioners :
6 v. : No. 03-358
7 PUBLIC CITIZEN, ET AL. :
8 - - - - -X
9 Washington, D.C.
10 Wednesday, April 21, 2004
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:03 a.m.
14 APPEARANCES:
15 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
16 Department of Justice, Washington, D.C.; on behalf of
17 the Petitioners.
18 JONATHAN WEISSGLASS, ESQ., San Francisco, California; on
19 behalf of the Respondents.
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C O N T E N T S

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| ORAL ARGUMENT OF | PAGE |
| EDWIN S. KNEEDLER, ESQ. | |
| On behalf of the Petitioners | 3 |
| JONATHAN WEISSGLASS, ESQ. | |
| On behalf of the Respondents | 26 |
| REBUTTAL ARGUMENT OF | |
| EDWIN S. KNEEDLER, ESQ. | |
| On behalf of the Petitioners | 52 |

1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 03-358, the Department of Transportation v.
5 Public Citizen.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF THE PETITIONERS

9 MR. KNEEDLER: Mr. Chief Justice, and may it
10 please the Court:

11 In February of 2001, an international
12 arbitration panel, convened under the North American Free
13 Trade Agreement, concluded that the United States'
14 continuation of a blanket ban or a moratorium on the
15 operation of Mexican domiciled commercial carriers beyond
16 the border zone in the United States violated NAFTA.

17 Soon thereafter, the President made clear --
18 excuse me -- his intention to comply with the arbitration
19 decision by invoking power specifically vested in him by
20 Congress to lift the moratorium in order to comply with an
21 international trade agreement. And the President in fact
22 did lift the moratorium in November of 2002.

23 In this case, the Ninth Circuit held that the
24 Federal Motor Carrier Safety Administration, an agency in
25 the Department of Transportation that is limited to a -- a

1 safety mandate, was required to conduct an elaborate and
2 complex environmental analysis of the President's foreign
3 trade and foreign policy decision before it could enter or
4 issue procedural safety regulations that were necessary to
5 implement the President's decision. The Ninth Circuit set
6 aside the procedural regulations on that ground and
7 thereby prevented the agency from granting certification
8 to carriers that under the President's decision were
9 eligible to receive it.

10 The Ninth Circuit's decision is incorrect and it
11 has frustrated the President's ability to comply with
12 NAFTA.

13 Congress and the President, the two entities
14 whose joint action brought about the lifting of the
15 moratorium, are not subject to either NEPA or the
16 provisions of the Clean Air Act that respondents rely on
17 to require an environmental analysis. Accordingly, the
18 agency acted entirely reasonably in choosing to take the
19 President's action as a given, including any increased
20 traffic or trade that might occur as a result of the
21 President's decision and to, instead, focus its own
22 environmental analysis on the effects of its own
23 procedural regulations.

24 FMCA's government -- governing statute requires
25 it to grant registration to any carrier that is willing

1 and able to comply with applicable safety, safety fitness,
2 and financial responsibility requirements. The agency has
3 no authority to deny operating permission to a carrier,
4 foreign or domestic, based on environmental concerns or
5 foreign trade concerns. It has no authority to
6 countermand the President's decision or to refuse to issue
7 the regulations that were necessary to implement the
8 President's decision.

9 QUESTION: Mr. Kneedler, just a -- a background
10 fact. Perhaps I missed it, but was there any parallel in
11 Canada? We're talking about Mexico or Mexican vehicles.
12 I understood that originally there was the same limitation
13 for both.

14 MR. KNEEDLER: There was. And -- and soon
15 thereafter, the -- the moratorium was imposed in 1982
16 originally, but it conferred on the President the power to
17 lift the moratorium, and an agreement was arrived at soon
18 thereafter with Canada. So since the early '80's,
19 Canadian carriers have been -- have been permitted to
20 enter.

21 The -- the moratorium was remained in --
22 retained in effect by the President through subsequent
23 actions into the '90's. In the North American Free Trade
24 Agreement, the United States included a reservation to a
25 complete opening of the border for transporter operations

1 by carriers subject to a phase-out, initially a phase-out
2 that would allow carriers from Mexico to operate in any of
3 the border States -- that was 3 years after the agreement
4 was signed -- and then by the year 2000, to allow the
5 carriers to operate anywhere in the United States. The
6 President decided not to go forward with that because of
7 concerns about whether the safety regulatory regime in
8 Mexico was sufficient to prepare the Mexican carriers to
9 come into the United States. So that is the reason why it
10 was held up.

11 And -- and the basis of the NAFTA arbitration
12 panel's decision was that a blanket prohibition on that
13 ground was not -- was -- was not permissible under NAFTA
14 and that the United States had to consider applications
15 from Mexican carriers on a case-by-case basis. It could
16 adopt special procedures to ensure that the carriers who
17 would be permitted to come in under the President's
18 lifting of the moratorium would satisfy the substantive
19 safety standards. And that is the set of regulations that
20 are at issue here.

21 But it's important to recognize that these are
22 not substantive safety standards. The substance -- the
23 standards that -- that Mexican carriers, like -- like
24 other foreign and domestic carriers in the United States
25 have to comply with, are -- have already been in place.

1 All that we are talking about here are essentially
2 procedural or administrative regulations.

3 QUESTION: Mr. Kneedler, can I ask you a
4 question? Because I'm really kind of confused about this.
5 I'm trying to think through the case. Assume the
6 President wasn't involved at all and Congress had decided
7 to lift the moratorium and enact it and did everything the
8 President did and said, but before you do it, we want you
9 to, as a precondition, adopt these safety regulations.
10 Would your position be any different?

11 MR. KNEEDLER: Oh, yes, yes. And it -- I think
12 it's the same situation. The FMCSA, as a subordinate
13 agency in the executive branch, I think would have to take
14 as a given that act of Congress just -- just as it was --
15 it was --

16 QUESTION: It wouldn't be any different. I --
17 you -- you --

18 MR. KNEEDLER: No, no. I --

19 QUESTION: I thought you were saying it's --

20 QUESTION: Your position would be the same.

21 MR. KNEEDLER: The same. Yes.

22 QUESTION: Oh, well --

23 MR. KNEEDLER: That's what I -- I'm sorry.

24 QUESTION: You scared me for a minute.

25 MR. KNEEDLER: No, no. I -- I misspoke.

1 (Laughter.)

2 MR. KNEEDLER: I'm sorry. I misspoke. The
3 position would be exactly the same and -- and for very
4 similar reasons, that that's essentially a political
5 decision, in the one case by Congress in your example, or
6 -- or by the President.

7 And -- and that's why Congress traditionally
8 vests an authority such as this in the President because
9 he is responsible for foreign relations and foreign trade.

10 QUESTION: But -- but in either event, it would
11 not have been the kind of major Federal action that must
12 be preceded by an EIS.

13 MR. KNEEDLER: That's correct.

14 QUESTION: That's your basic position.

15 MR. KNEEDLER: That's -- that's correct. It's
16 part of the context in which the agency is operating, but
17 it would be presumptuous of the agency to take upon itself
18 a -- a determination to evaluate or to second guess
19 effectively the President's determination.

20 QUESTION: Well, but -- but it wouldn't be a
21 question of second guessing, would it, if the agency
22 regulations in question could reduce somehow the -- the
23 impact that the -- the known action by the President,
24 who's pretty sure this was going to happen, would cause?
25 And -- and so it's sort of relevant, it seems to me,

1 whether these rules issued by the agency could, if there
2 had been an environmental impact statement, have been
3 adjusted in such a way as to reduce the -- the
4 environmental impact. Is there any relationship between
5 these rules and the environmental impact that the
6 respondents are concerned about?

7 MR. KNEEDLER: Two things I'd like to say about
8 that. The first one is that the -- that respondents'
9 claim in this case and the Ninth Circuit's holding in this
10 case are not premised on the sort of tinkering with the
11 application and monitoring rules that -- that you may be
12 referring to. The -- the premise of the Ninth Circuit's
13 decision was that -- that the President's lifting of the
14 moratorium was foreseeable and therefore FMCSA had to
15 evaluate the -- the much broader question of whether
16 Mexican trucks should be permitted to come in at all.

17 QUESTION: No, but I mean, my point is it -- it
18 seems to me obvious that you don't have to evaluate in an
19 environmental impact statement something that you have no
20 power --

21 MR. KNEEDLER: Right.

22 QUESTION: -- to -- to remedy.

23 MR. KNEEDLER: Right. As to your second point,
24 though, that -- that the agency might have been able to
25 refine the regulations in some way, that is not an

1 argument that respondents made to the agency. And under
2 Vermont Yankee -- and this is critical to the operation of
3 -- of NEPA and the corresponding Clean Air Act provisions
4 is that an agency can only evaluate or -- or identify
5 errors if they're called to its attention.

6 QUESTION: When did respondents first make this
7 point? You say they didn't make it in --

8 MR. KNEEDLER: The -- the first place that this
9 point -- I mean, it was really just in a sentence -- was
10 in a reply brief in the court of appeals that they -- that
11 they -- that they -- they said that the agency might have
12 been -- been able to come up with some modified version of
13 -- of the regulations.

14 But it's not very realistic to think that what
15 the agency could do -- could permissibly do -- could have
16 a significant effect on -- on emissions because --

17 QUESTION: Well, Mr. Kneedler, on -- on that --
18 going to that point, I mean, that goes to something
19 Justice Scalia raised and I wanted to raise it too. He --
20 he expressed, as a premise to his question -- and I had
21 assumed when I started out on this case -- that the agency
22 does not have to prepare an impact statement which takes
23 into consideration effects that the agency itself does not
24 have the authority to avoid.

25 MR. KNEEDLER: Right.

1 QUESTION: And -- and I'm looking -- by the way,
2 I'm on page -- what is it -- 2a of -- of your brief where
3 you set out the statute down at the bottom of the page,
4 Roman (i). One of the things the agency has got to
5 disclose is the environmental impact of the proposed
6 action. That I understand. They could avoid that in --
7 theoretically in -- in the general rule. They could say,
8 well, we won't take the proposed action if it has a very
9 bad effect. And that's consistent with what he assumed
10 and what I assumed.

11 But then you get to Roman (ii) and Roman (ii)
12 says they've got to disclose any adverse environmental
13 effects which cannot be avoided should the proposal be
14 implemented. And that seems to be broader. That seems to
15 say if your proposal, which in itself may be
16 environmentally benign, is the trigger for action by other
17 agencies or other people, which is not environmentally
18 benign, you've got to disclose the effects that will come
19 about when you take the triggering action even though
20 you're triggering action is clean. Am I -- am I
21 misreading that?

22 MR. KNEEDLER: Well, respondents have not relied
23 on that provision, but -- but my -- my understanding of
24 that is that that refers -- that refers to effects that --
25 that are within the agency's control.

1 The -- the critical point -- and this -- this is
2 reflected in the -- in the regulations on page 4a, the
3 things that an agency is responsible for taking account of
4 under NEPA, are direct -- things that are directly caused
5 or indirectly caused. And caused is the -- is the
6 operative word. And this Court said in the Metropolitan
7 Edison case that it's -- that -- that strict but-for
8 causation is not enough under NEPA.

9 QUESTION: But if -- if that's the -- if -- if
10 the -- if -- I'll call it (C)(ii) here -- is -- is being
11 read in that way, then I take it what it means -- let's
12 forget the presidential action here. Let's just take
13 conventional government action. If you had, let's say,
14 six Government agencies, each of which on a coordinated
15 basis was going to do something to bring about a result,
16 and the effect of the action of each one of those agencies
17 by itself really didn't amount to much, but the action of
18 all six together amounted to a very great deal
19 environmentally, there never would be an environmental
20 impact statement that would take into effect the
21 cumulative action.

22 MR. KNEEDLER: Right.

23 QUESTION: Is -- is that fair to say?

24 MR. KNEEDLER: And -- and I was just going to
25 say there is a separate requirement under the -- CEQ has

1 elaborate regulations that -- that flesh this out. And --
2 and CEQ has a regulation that the Ninth Circuit relied
3 upon and -- and respondents have -- have abandoned any
4 reliance on it, which is that an agency has to evaluate
5 cumulative impacts. It has to -- it has to essentially
6 evaluate the incremental contribution that its own action
7 will make toward a --

8 QUESTION: Then why doesn't that apply here?

9 MR. KNEEDLER: Because the -- the -- first of
10 all, the agency did that. It evaluated its incremental --
11 its incremental impact. What -- what it did --

12 QUESTION: But I'm talking about the cumulative
13 effect. I -- I thought -- maybe I misunderstood what
14 you've said.

15 MR. KNEEDLER: It -- it --

16 QUESTION: I thought under the Council of
17 Environmental Quality reg, at some point they had to take
18 into effect -- they had to disclose the cumulative effect.

19 MR. KNEEDLER: Well, if you mean -- if you mean
20 with the -- the --

21 QUESTION: The effect of all the agencies
22 together in my hypothesis. You've got six agencies. Each
23 of them does a little thing. Add the six together. You
24 get a big thing. I thought you were saying that under the
25 Council on Environmental Quality regs, somewhere along the

1 line somebody has got to disclose in an -- in an impact
2 statement --

3 MR. KNEEDLER: Yes, and -- and --

4 QUESTION: -- the cumulation.

5 MR. KNEEDLER: Right, and -- and what -- what
6 the --

7 QUESTION: So why wasn't it done here?

8 MR. KNEEDLER: Well, the -- the agency here was
9 the only one taking action, and all the cumulative impact
10 requirement requires it to do is to isolate what its
11 incremental contribution will be --

12 QUESTION: Well, that's under Roman (i), but
13 under Roman (ii) it's broader, and you said, I thought,
14 under the Council on Environmental Quality regs, at some
15 point you've got to disclose the cumulative effect of all
16 of it. So on my hypothesis, it's -- when -- who -- what
17 agency and when has to disclose the cumulative effect --

18 MR. KNEEDLER: Well, if -- if there are --

19 QUESTION: -- and why wasn't it done here?

20 MR. KNEEDLER: If there are -- if there are two
21 agencies working in tandem -- see, the -- again, the
22 President --

23 QUESTION: So you're saying --

24 MR. KNEEDLER: -- the President --

25 QUESTION: -- it -- it would have been done here

1 but for the fact that the President is not an agency.

2 MR. KNEEDLER: If two agencies -- if two
3 agencies are taking parallel action, they are supposed --
4 or coordinated action, they're supposed to coordinate
5 the --

6 QUESTION: Right, and you're saying because the
7 President is not an agency, that doesn't apply here.

8 MR. KNEEDLER: Right. Right. And -- and --

9 QUESTION: Now, does the -- does the Council on
10 Environmental Quality regulation say that the -- that the
11 disclosure of cumulative effect depends upon the action of
12 many agencies as opposed to the actions of many persons to
13 which an agency contributes?

14 MR. KNEEDLER: It is -- it is -- it's
15 addressed --

16 QUESTION: Yes, but what is it?

17 MR. KNEEDLER: -- more -- it -- it includes
18 more --

19 QUESTION: But is it --

20 MR. KNEEDLER: It's not just limited to other
21 agencies, but there's an --

22 QUESTION: Then why didn't it apply here? We'll
23 assume the President is not an agency. Why didn't that
24 requirement apply here?

25 MR. KNEEDLER: The agency did comply by saying

1 this is the context in which we were acting. What they
2 said is we have no control. And this is the --

3 QUESTION: Yes.

4 MR. KNEEDLER: -- literally language. We have
5 no control over what the President is going to do. It
6 projected -- it projected increases in traffic or -- or
7 increases in trade that might -- might result or discussed
8 that. So that's really what the cumulative impact
9 analysis requires is to -- for the agency to put its own
10 action in context.

11 But where the agency's own action is marginal,
12 which is the case here, it can be expected -- these are
13 basically administrative undertakings by the agency,
14 application forms, and -- and on-site inspections. That
15 -- that where the agency's own action is going to
16 contribute so marginally to environmental impacts, the
17 rule -- the general rule of reason under -- under NEPA
18 does not require an agency to, for -- for example, conduct
19 a -- a nationwide study of Clean Air Act possible effects
20 of Mexican trucks in order to determine that its own
21 contribution is going to be minimal.

22 And -- and what -- what -- as I mentioned, the
23 agency's contribution here arises simply from developing
24 an application form, a -- a preapproval analysis, on-site
25 analysis, of -- of the carrier in Mexico in most cases, or

1 -- or on paper, and then follow-up monitoring and
2 inspections. And the only real contribution to emissions
3 that any of that would have are the -- are the roadside
4 inspections where the engine might be -- will be idling a
5 little bit while the truck is inspected and the agency
6 fully evaluated its contribution to increased emissions
7 for that and concluded that they would be negligible,
8 looked at in that way. And neither the Ninth Circuit nor
9 respondents have ever challenged that.

10 And as I -- as I mentioned, although the -- the
11 Ninth Circuit treated the President's action as -- as a --
12 a consequence of what the agency did, the respondents have
13 receded from that position as well.

14 And they have -- they have relied on this
15 appropriations provision, section 350, as it's been
16 referred to in this litigation, which required FMCSA to do
17 certain things before it could spend any money to approve
18 individual applications of carriers that would be eligible
19 under the -- under the President's lifting of the
20 moratorium. But section 350 reinforces our position
21 because it reinforces the proposition that the agency's
22 role was limited to safety matters.

23 QUESTION: Did 350 limit itself in its
24 directions to the agency to safety matters?

25 MR. KNEEDLER: Yes. There's not -- there's no

1 mention of -- of environment -- environmental issues in --
2 in it. And in fact, what it did is it further constrained
3 FMCSA's discretion. Whatever discretion -- and it -- and
4 it overrode or made more strict the agency's initial
5 proposed regulations by requiring safety evaluations in
6 Mexico and stringent evaluations afterward. It added some
7 very strict requirements because Congress wanted to make
8 sure that the agency was going to impose --

9 QUESTION: Mr. Kneedler?

10 MR. KNEEDLER: -- stringent qualifications.

11 QUESTION: Mr. Kneedler, can I ask you another
12 kind of preliminary question? I was just reexamining the
13 statute that Justice Souter was calling your attention to.
14 And the President, of course, is not an agency within the
15 meaning of the introductory paragraph. Does that mean
16 that an action taken by the President is not a major
17 Federal action within the meaning of subparagraph (C)?

18 MR. KNEEDLER: Yes, because it -- it --

19 QUESTION: Because if I'm an agency --

20 MR. KNEEDLER: They kept it -- the duty -- the
21 duty is imposed on the agency. That's the way it has been
22 understood.

23 QUESTION: I see.

24 MR. KNEEDLER: And the agency shall include in
25 it --

1 QUESTION: It should read any major Federal
2 action undertaken by the agency --

3 MR. KNEEDLER: Yes.

4 QUESTION: -- is implicitly --

5 MR. KNEEDLER: Because it says include in every
6 -- the agency in -- in the introductory part shall include
7 in every recommendation or report on proposals or major
8 Federal action. I think it's referring to its own
9 proposal for a major -- a major Federal action.

10 QUESTION: And -- and we've held that? It's
11 certainly a permissible reading of it. I'm not sure it's
12 a necessary reading.

13 MR. KNEEDLER: I don't know that this Court has
14 ever specifically addressed it, but I think that's been
15 the common understanding. And I think it follows in this
16 case from the exemption of the President from -- from NEPA
17 at all.

18 And the -- I -- I mentioned before that section
19 350 serves to confine the agency's discretion here. And
20 the -- the agency's decision that an environmental
21 assessment was all that was necessary and a full-blown
22 environmental impact statement was not required is
23 reinforced in this case by the -- by decisions of a number
24 of courts of appeals that have said that where an agency
25 does not have discretion, it does not have to prepare an

1 environmental impact statement because the purposes of
2 NEPA are really to inform the agency's own decision-making
3 process and to inform the public so it can participate in
4 the agency's decision-making process.

5 Where the agency essentially has no discretion
6 about whether to -- to go forward, as the agency here did
7 not, then to require a full-blown environmental impact
8 statement of -- of clean air issues, which are exceedingly
9 complex, before the agency would go -- could go forward
10 would not further the purposes of -- of NEPA and would
11 only serve, in fact, to slow down the process of complying
12 with NAFTA.

13 QUESTION: Well, in fact, an agency could
14 produce an EIS that said what we propose to do is
15 disastrous and nevertheless go ahead, could it not?

16 MR. KNEEDLER: Yes, yes. NEPA imposes no
17 substantive requirement. But -- but in this case there
18 was really a need for expedition, and it's -- and that's
19 -- that's made evident here by the fact that the statute
20 that authorized the President to lift the moratorium
21 provided for the President to give notice and allow public
22 comment for that, but allowed him to waive that where
23 expeditious action was required. And when the President
24 looked at the moratorium in November of 2002, he
25 specifically invoked that tradition, dispensed with

1 further opportunity for public comment because he
2 determined that expeditious action was required.

3 It's very much like this Court's decision in
4 Crosby several terms ago in that way because the --
5 although here it's a subordinate Federal agency rather
6 than a State, but the result is to interfere with the
7 ability of the President to respond promptly to an
8 international disagreement that had arisen out of a
9 foreign trade agreement.

10 I did want to spend just a moment on the Clean
11 Air Act conformity analysis point which the -- the
12 conclusion on that we think follows directly from the
13 conclusion on NEPA.

14 Under -- under EPA regulations that were
15 promulgated in 1993, respondent doesn't challenge them
16 here, and the D.C. Circuit has upheld them. Under those
17 regulations an -- an agency is required to conduct a
18 conformity analysis and to conform its action only where
19 its action causes emissions, but beyond that, where --
20 where the emissions are subject to the agency's
21 practicable control and where the agency will maintain
22 that control through continuing program authority --

23 QUESTION: That is -- that is set forth in the
24 regulations?

25 MR. KNEEDLER: Yes. That -- that -- and that

1 regulation is set forth in our -- in our brief on page 8a
2 of -- of the brief, the definition of the term, indirect
3 emissions, which elsewhere is described as the emissions
4 for which the agency is responsible.

5 And in this case, it's -- it's very clear that
6 the FMCSA does not have any control over or continuing
7 responsibility for the President's decision to lift the
8 moratorium, for the determination of whether carriers that
9 get registration will actually bring trucks into the
10 United States, what routes they will travel while in the
11 United States, and what emissions they will have once
12 they're in the United States. Those are all things that
13 are beyond the agency's control.

14 QUESTION: Mr. -- Mr. Kneedler, I -- I read the
15 regs the same way you do. The -- the interesting thing to
16 me was, although it's probably -- I guess it's academic
17 here is that the statute seems to be broader than the regs
18 because the -- the statute would -- would require
19 attention -- and I'm reading from page 45 of your -- your
20 brief where you set it out in the carryover paragraph.

21 The -- the statute would -- would require
22 attention to -- to anything by -- done by the agency which
23 would not only cause but contribute to a new air quality
24 -- to an air quality violation. And I -- I would suppose
25 even on the kind of the -- the low-level effect that the

1 agency has disclosed here, idling motors and so on, that
2 the -- that the statute would cover it, although the regs
3 are narrower and the regs wouldn't cover it. Do you read
4 the statute the same way?

5 MR. KNEEDLER: The -- the regulations are an
6 interpretation of the statute the --

7 QUESTION: Yes, yes.

8 MR. KNEEDLER: -- that the agency adopted
9 through notice and comment rulemaking, and the -- the
10 preamble to that regulation contains a very extensive and
11 persuasive discussion by EPA about why it's necessary to
12 draw a line between the things that -- for which a Federal
13 agency can be reasonably held accountable or responsible
14 and those for which the -- after all, the States are
15 primarily responsible in developing --

16 QUESTION: Yes.

17 MR. KNEEDLER: -- implementation plans.

18 And one of the -- one of the things that -- that
19 EPA specifically concluded, that it's unrealistic to think
20 that Congress meant that just because you need a permit at
21 the very outset -- we -- we quote this in our reply brief.
22 Just because you need a permit to do something should not
23 render the agency responsible for every subsequent thing
24 that somebody who gets a permit might do, get a driver's
25 license, for example, doesn't -- yes, it's a precondition

1 to driving, but it doesn't mean that the permitting agency
2 should be responsible for evaluating of all the -- all
3 the --

4 QUESTION: But they would have to disclose it.
5 I mean, if -- if you read the statute literally, without
6 the narrow -- I -- I don't mean to load the dice when I
7 say narrowing -- without the agency interpretation, the
8 statute would be broad enough at least to -- to require
9 this agency to disclose its contribution.

10 MR. KNEEDLER: Well, I suppose under the
11 broadest reading, but I think even that might -- might be
12 a extensive reading of the regulation. And let me also
13 just say again that respondents have not challenged the
14 validity of the regulation.

15 QUESTION: I know.

16 QUESTION: May I -- may I ask this other
17 question just in displaying my ignorance of the whole
18 problem? But is it not conceivable that consistently with
19 the statute, that the agency could be compelled to prepare
20 an environmental impact statement but nevertheless not
21 suspend the -- or nevertheless let the trucks come in?

22 MR. KNEEDLER: I -- it -- it could voluntarily
23 do that, but the -- but the -- the case law --

24 QUESTION: No. Assume you read the statute to
25 require it to make a statement. Does it necessarily

1 follow that the -- the -- there must be an injunction
2 against the trucks coming in while they -- while they do
3 that? I know normally it's -- it's done that --

4 MR. KNEEDLER: No. No, it -- no, it would not
5 follow and -- and --

6 QUESTION: Which the converse of that is that
7 even if you're right, conceivably -- I mean, even if your
8 basic concern is right that the trucks should come in,
9 conceivably the duty to prepare the statement might
10 remain.

11 MR. KNEEDLER: NEPA has -- has not been
12 interpreted that way over the years where an --

13 QUESTION: But this -- this case involves the
14 President, so it's a very unusual case.

15 MR. KNEEDLER: But -- but even in the non-
16 presidential case where an agency does not have
17 discretion, because the EIS is designed to inform the
18 agency's decision-making power, and if it really has no --
19 no latitude in its decision-making, it would be
20 essentially pointless to prepare it.

21 QUESTION: Yes, but assuming it was an agency
22 that had some discretion in the matter, my understanding
23 is it -- it can't go ahead without first making the
24 environmental impact statement.

25 MR. KNEEDLER: No, that's true, but -- but we do

1 think that there is some room for remedial discretion
2 where -- where even if there's a violation, the -- not to
3 mention the -- the principle of prejudicial error under
4 the APA that if there's -- if there's a defect, it doesn't
5 always have to result in setting it aside.

6 If I may reserve the balance of my time.

7 QUESTION: Very well, Mr. Kneedler.

8 Mr. Weissglass, we'll hear from you.

9 ORAL ARGUMENT OF JONATHAN WEISSGLASS

10 ON BEHALF OF THE RESPONDENTS

11 MR. WEISSGLASS: Mr. Chief Justice, and may it
12 please the Court:

13 Congress gave FMCSA important choices to make
14 about safety before any trucks come over the border from
15 Mexico. Those choices will determine which trucks come in
16 and how many.

17 The reason for that is because as the safety
18 rules are made more stringent, fewer trucks will be able
19 to meet the requirements and those that do will be newer.

20 QUESTION: But this wasn't your argument. Your
21 argument was, as -- as I understood it, that the reason
22 the EIS had to be prepared was not because there would be
23 any substantial environmental impact from the nature of
24 the safety standards, but because no trucks at all can
25 come in until -- until the agency comes out with this --

1 with these standards. Isn't that right?

2 MR. WEISSGLASS: The -- the argument is that
3 because Congress promulgated section 350 --

4 QUESTION: Right.

5 MR. WEISSGLASS: -- no trucks can come in until
6 the agency makes these safety choices.

7 QUESTION: Okay. Therefore, that's a
8 consequence of the agency action. Therefore, the agency
9 has to do an EIS.

10 MR. WEISSGLASS: That is correct. And in
11 addition, the --

12 QUESTION: Now, just let me ask. The -- that
13 happens because the President's action is triggered by or
14 cannot occur until the agency takes this action.

15 Suppose you have a mad millionaire who has
16 applied for a -- a license from the Federal Communications
17 Commission and there are others who are competing for the
18 same license, and he announces that if he is denied the
19 license and the license is given to somebody else, he is
20 going to unleash a flood of trucks around the country,
21 pouring out emissions and -- and greatly affecting the --
22 the air quality throughout the country. Does the FCC,
23 knowing that this is going to be the consequence of their
24 granting the license to this particular individual -- does
25 it have to do an environmental impact statement?

1 MR. WEISSGLASS: The -- the question --

2 QUESTION: Concerning, you know, what the
3 environmental impact of the -- of the mad millionaire's
4 actions are going to be?

5 MR. WEISSGLASS: The -- the only question is
6 whether the -- first -- there are two questions. First,
7 whether that the agency has control over -- over the
8 choices that it's making, and second --

9 QUESTION: Has no control over the mad
10 millionaire, just as this agency has no control over the
11 President.

12 MR. WEISSGLASS: If -- if the -- if the -- if it
13 comes down to foreseeability, when the agency takes --

14 QUESTION: The mad millionaire put it in
15 writing. It -- it's sworn to. It's absolutely certain
16 he's going to do it. He really is crazy.

17 (Laughter.)

18 MR. WEISSGLASS: The -- the critical point is --
19 is whether the agency has a choice about the -- the
20 options that it is going to take. If the agency has
21 control over what it's going to do, and in the reasonably
22 foreseeable --

23 QUESTION: It does. It does. It can deny the
24 license to this person and give it to somebody else.

25 MR. WEISSGLASS: Right. Then -- then the

1 question just becomes foreseeability, and if it's
2 foreseeable, the agency then has to take account the --
3 the effects of the --

4 QUESTION: So the FCC would have to do an EIS in
5 this situation.

6 MR. WEISSGLASS: In that situation, that is
7 correct.

8 QUESTION: That's absurd.

9 MR. WEISSGLASS: But that --

10 QUESTION: Fine. Now, suppose --

11 QUESTION: That is so absurd.

12 QUESTION: -- instead of the mad millionaire,
13 what the -- we have the mad millionaire. But now what the
14 statute says is every license that's issued for safety --
15 safety purposes -- has to be a stamp that you put in the
16 car, and then there's a rule that says, no stamp shall
17 issue until the Post Office Department certifies it will
18 be red or blue. All right? And moreover, there could be
19 an environmental impact just from the red and blue. I
20 mean, one reflects the --

21 Now, the Post Office knows that if it tells you
22 what color it is, then they'll have it, and if they have
23 it, they give out the license. And if they give out the
24 license, the mad millionaire is going to let loose smoke
25 throughout the Nation. Does that mean that the Post

1 Office Department has to write an environmental impact
2 statement about the mad millionaire? No. The answer is
3 clearly no. Isn't it?

4 But the only problem is your theory doesn't tell
5 me why.

6 MR. WEISSGLASS: The -- the reason is this. In
7 -- in this case the agency has significant choices to make
8 about safety. Congress --

9 QUESTION: And so does the Post Office. It's
10 going to be red or blue. Now, the relationship between
11 the red and blue choice and environmental being wrecked
12 through the smoke of the mad millionaire is zero. And
13 now, you want to say that's not true with this safety
14 regulation. So explain why.

15 MR. WEISSGLASS: Because it's -- it's what
16 Congress -- it's how Congress set up the -- the situation.
17 Congress said that no trucks come in until the agency
18 makes these choices and Congress gave the agency
19 discretion about those choices and those choices will
20 determine which trucks come in and how many and therefore
21 the environmental effects.

22 Now, just because the -- there is -- there is
23 another actor that has to make decisions and has to take
24 action before there will be any environmental effects does
25 not remove this from major Federal action.

1 That's the Robertson case that this Court
2 decided where the agency has to decide yes or no to issue
3 a permit. Upon issuing the permit, nothing will happen
4 until a private construction company builds a ski resort.

5 That -- that is -- that is what -- what is going
6 on here. The -- the agency has this significant choice to
7 make about what to do in its -- in its regulations, and
8 once it makes that choice, but only then, will the trucks
9 be over --

10 QUESTION: Now, was this basis for the Ninth
11 Circuit decision?

12 MR. WEISSGLASS: I -- I believe this was the
13 basis for the Ninth Circuit decision. The President and
14 the agency have separate actions to take, and it's not
15 that --

16 QUESTION: But -- but in -- in --

17 QUESTION: But the Ninth Circuit seemed to me to
18 speak in terms of but-for causation and that just because
19 the agency knew that many more trucks were going to be
20 coming in, even though as a result of somebody else, the
21 fact that the agency -- that they couldn't come in until
22 the agency acted meant that the agency had to do an EIS.
23 That -- that seems a very doubtful proposition to me.

24 MR. WEISSGLASS: It really is very similar to
25 the Robertson scenario. The construction company couldn't

1 take any action until they got the permit.

2 QUESTION: Yes, but the permit could have
3 forbidden the action. The permit related to whether --
4 the -- the agency's decision related to whether this
5 construction company could build a ski resort or not.
6 This agency's action has no bearing upon -- upon the
7 environment. It has no bearing upon whether the -- the
8 President can take his independent action. It's just been
9 artificially connected just the way the mad millionaire's
10 was.

11 MR. WEISSGLASS: Justice Scalia, the -- the
12 difference --

13 QUESTION: They -- they were not part of the --
14 of the program to decide whether the ski resort is going
15 to be built.

16 MR. WEISSGLASS: The -- the difference here is
17 that the agency has significant choices to make about
18 safety. It can determine, in fact, how many older trucks
19 are going to be coming in. And it's the older trucks that
20 are more polluting. And -- and --

21 QUESTION: No, but can't the -- isn't the
22 agency's discretion to determine whether older trucks come
23 in or not a discretion which is supposed to be exercised
24 on the basis of safety considerations rather than
25 environmental considerations?

1 MR. WEISSGLASS: But that's the point of NEPA,
2 that -- what NEPA says is just because you have a safety
3 agency doesn't mean it can divorce its safety
4 considerations from the environment. It doesn't have
5 to --

6 QUESTION: Those safety considerations that are
7 within its control that would be affected by its safety
8 regulations are minimal. I don't think anybody said that
9 this would have been a major Federal action requiring an
10 environmental impact statement if there were nothing
11 involved except whether these safety rules are going to
12 cause more pollution or not. Your -- what you're using to
13 require the EIS is the fact that, boom, once they come out
14 with their safety rules, floods of -- of Mexican trucks
15 come into the country.

16 MR. WEISSGLASS: That's part of it, but the --
17 but it's also true that what the agency does can -- can
18 have a huge effect in terms of how many trucks are
19 actually going to come over. Even if you assume that some
20 trucks are definitely going to come over, what the agency
21 does is -- is going to have a big effect.

22 The agency specifically says that the rules are
23 going to target high-risk trucks -- and this is from the
24 environmental assessment -- to, quote, bring them into
25 compliance with United States safety and environmental

1 laws. The agency knew that there was this correlation
2 between safety and the environment. And we're talking
3 about tens of thousands of trucks, and a Mexican fleet
4 that is skewed much older than the U.S. fleet.

5 QUESTION: Well, don't -- don't the rules have
6 to be such that American trucks and Mexican trucks are
7 treated alike?

8 MR. WEISSGLASS: I -- there's -- actually the --
9 the arbitral panel in NAFTA specifically said that the
10 U.S. could treat Mexican trucks differently than U.S.
11 trucks as long as it has a good reason. But the Court
12 doesn't even --

13 QUESTION: It doesn't. Would it be a good
14 reason -- I mean, I take it you're here not being against
15 Mexicans. You're against environment.

16 MR. WEISSGLASS: We're for environment.

17 QUESTION: So if in fact -- yes. I mean for
18 environment.

19 (Laughter.)

20 QUESTION: You're against bad environment. All
21 right. We're all against that.

22 Now, if in fact it turns out that there is some
23 kind of problem, is -- does the agency have the power to
24 say if there's too much smoke or there's too much bad
25 effect, we want American trucks to have to tighten up too?

1 We don't want just Mexican trucks to have to. We want
2 everybody to have to.

3 MR. WEISSGLASS: Yes.

4 QUESTION: Was that your position in front of
5 the agency?

6 MR. WEISSGLASS: The agency does have that --
7 that power. The -- the --

8 QUESTION: All right. Then do they also have to
9 study the impact of the American trucks?

10 MR. WEISSGLASS: If -- if the agency takes major
11 action with respect to emissions of U.S. trucks, yes.

12 QUESTION: No, no. But I mean, here you're
13 saying that this 350 requires them to start looking at all
14 the smoke and so forth that comes up from the Mexican
15 trucks because their safety regs could have an impact on
16 that. Well, if in fact the overall framework of this
17 inquiry is to make certain that we don't pollute the
18 environment or that we're safe in a context where Mexicans
19 and Americans are to be treated alike, wouldn't they have
20 to go into the whole thing?

21 MR. WEISSGLASS: No, because the agency
22 rulemakings that we challenge deal solely with the -- with
23 -- with trucks coming over from Mexico. Now, if they were
24 to do a rulemaking about U.S. trucks, then that might be
25 an issue. But this is relating solely to Mexico.

1 And -- and there are numerous -- numerous things
2 that the agency can do that -- that -- about safety of --
3 of trucks coming over from -- the border from Mexico that
4 will cause the older trucks that are both less safe and
5 more polluting not to be able to come in.

6 QUESTION: Were -- were these points pressed on
7 the agency during the proceedings?

8 MR. WEISSGLASS: The -- the agency --

9 QUESTION: Can you answer yes or no?

10 MR. WEISSGLASS: Yes.

11 QUESTION: Okay.

12 MR. WEISSGLASS: The -- there were numerous
13 comments to the agency about safety, and the agency, as I
14 mentioned before --

15 QUESTION: But to say there were numerous
16 comments about safety doesn't certainly answer my
17 question.

18 MR. WEISSGLASS: The -- the agency said that it
19 was going to target high-risk trucks to be in compliance
20 with safety and environmental laws. And because the rules
21 only deal with safety, that's a concession that safety
22 choices affect the environment. Nothing else needed to be
23 told to the agency.

24 QUESTION: Well --

25 QUESTION: So your -- your answer to my question

1 is no I guess, that you did not press on the agency this
2 point. You say the agency already knew it.

3 MR. WEISSGLASS: The -- right. The agency knew
4 it and the public was not required to cause the agency to
5 connect the dots.

6 QUESTION: Knew -- knew what?

7 MR. WEISSGLASS: The agency knew that there was
8 a --

9 QUESTION: That -- that high-risk trucks are
10 what? More polluting?

11 MR. WEISSGLASS: The -- the agency knew that --
12 that older trucks are both less safe and more polluting,
13 that there's a correlation --

14 QUESTION: Between pollution and age.

15 MR. WEISSGLASS: And -- and that -- and it
16 specifically --

17 QUESTION: And was that brought to the agency's
18 attention as one of the things that they should take into
19 account in -- in their safety rules?

20 MR. WEISSGLASS: The -- the agency had it --
21 said it in its environmental assessment and what I just
22 said. And the public commented that the older trucks are
23 more polluting. And the agency admits it's a matter of
24 common sense that the older trucks are less safe.

25 QUESTION: The agency did take it into account

1 in its environmental assessment and concluded that there
2 was no significant environmental impact just from the
3 content of its rules, and therefore they didn't have to do
4 an EIS.

5 And I -- I had thought that it was not that call
6 that you're challenging. I had thought that what you're
7 challenging is that may well be true, that -- that just
8 from the content of the rules, there's no significant
9 impact. However, the rules trigger the presidential
10 action which lets in the Mexican trucks and that is the
11 significant environmental impact. Wasn't that the
12 accurate -- an accurate description of your case?

13 MR. WEISSGLASS: Yes, both that and the choices
14 that the agency makes which will determine not only
15 whether any trucks come in but how many.

16 QUESTION: Not the choices alone. I do -- I do
17 not -- I do not understand you to have claimed that purely
18 on the basis of what safety choices the agency makes,
19 there is a significant impact upon the environment which
20 would be enough to trigger a requirement for an EIS. Is
21 -- is that claim made in your --

22 MR. WEISSGLASS: We absolutely did -- did make
23 that claim in -- in --

24 QUESTION: All right. Can you point to that?
25 Because that -- to me, that's what your answer to the

1 problem, you know, with the decal color. It -- it really
2 depended on that. And I do believe that they're saying --
3 and on that one, it seems to me, look, you have choice A
4 at the agency, B, or C, and this is more polluting than
5 that and the other isn't. I don't see why they wouldn't
6 have to write an EIS for that. But I think that's what
7 they're saying you never raised before the agency.

8 So could you tell me or could I get somewhere or
9 is it in here the place that's particularly before the
10 agency where all this was gone into and raised?

11 QUESTION: And too, where it was raised before
12 the Ninth Circuit.

13 QUESTION: Yes.

14 MR. WEISSGLASS: If I could, I'd like to start
15 with the Ninth Circuit. We raised it in our reply brief,
16 as Mr. Kneedler said. And the Ninth Circuit passed on it.

17 QUESTION: No, no. But that's not the issue.
18 The issue really is the agency for me.

19 MR. WEISSGLASS: Okay.

20 QUESTION: I mean, where -- where before the
21 agency was it raised?

22 MR. WEISSGLASS: The -- the agency, as I said,
23 agreed there's this correlation between safety and the
24 environment. There -- the public did not need to tell the
25 agency what to do with that because Vermont Yankee makes

1 it an obligation of the agency to consider every
2 significant aspect of the environmental effects of its
3 action. This is not a situation like in Vermont Yankee
4 where someone raised an issue about unchartered territory
5 and refused to clarify. The agency has an affirmative
6 obligation to take this into account because it had the
7 predicate facts in front of it.

8 QUESTION: All right. Are you saying we didn't
9 raise it before the agency? The reason we didn't is that
10 we didn't have to. All we had to do was raise it when we
11 appealed from the agency. Is that your answer?

12 MR. WEISSGLASS: You said it much better than I
13 could. Yes.

14 QUESTION: Okay.

15 QUESTION: But if that's your answer, then you
16 didn't raise it, and then the question would be does an
17 agency have to have figured out here that its different
18 alternatives in front of it might have had differential
19 environmental impacts that they didn't take account of.
20 Now, how am I going to answer that question?

21 MR. WEISSGLASS: The answer is yes.

22 QUESTION: I know you think --

23 MR. WEISSGLASS: Because --

24 QUESTION: -- it's yes. I want to know what I
25 read --

1 MR. WEISSGLASS: Yes.

2 QUESTION: -- and try to -- try to figure out
3 whether it is yes.

4 MR. WEISSGLASS: Because --

5 QUESTION: What -- what -- go ahead.

6 MR. WEISSGLASS: Because -- thank you, Mr. Chief
7 Justice.

8 Because in the joint appendix at page 193, the
9 agency admits this correlation, and it was also record
10 evidence before the agency that the Mexican fleet is much
11 older than the U.S. fleet, that the older trucks are more
12 polluting. And so it stands to reason -- and -- and this
13 is what the agency has to do when it's considering
14 environmental effects is look at what its safety choices
15 are going to do in terms of the environment.

16 QUESTION: Well, why did -- why did you wait
17 until the petition for rehearing in the Ninth -- Ninth
18 Circuit to raise it before that court?

19 MR. WEISSGLASS: It wasn't rehearing. It was on
20 a reply brief. It was in response to the agency's
21 admission in its opposition brief that the stringency of
22 the standards does have this effect.

23 QUESTION: What -- here is -- here's what the
24 Ninth Circuit said. DOT's assessment that its regulations
25 will cause emissions below the amounts specified in 40

1 C.F.R. 93 blah, blah, thus excusing it from making a
2 conformatory determination is based on the predicted
3 emissions in its EA. As we have already determined,
4 however, DOT failed to conduct a reliable environmental
5 analysis because of its illusory distinction between the
6 effects of the regulations themselves, which is what we've
7 been talking about, and the effects of the presidential
8 rescission of the moratorium.

9 It seems to me it was essential to the Ninth
10 Circuit's decision that you have to take into account,
11 before -- before you win, the -- the impact of the
12 President's decision. The Ninth Circuit did not base it
13 just on the effects of the regulations themselves.

14 MR. WEISSGLASS: The -- and the Ninth Circuit
15 also said that the -- the environmental assessment was
16 inadequate for, quote, not considering additional
17 alternatives such as, for example, proposing more
18 stringent controls on incoming Mexican trucks. The Ninth
19 Circuit clearly recognized that there was this correlation
20 between a stringency of the rules and the environmental
21 effects.

22 Now, it's very important to understand that the
23 way Congress set this up was it's not that the agency is
24 somehow overriding a presidential decision. There are two
25 separate and independent decisions here. The President

1 has authority over trade issues the way Congress gave him
2 that authority. But the Congress at the same time said
3 that the agency has authority over safety issues. These
4 are two separate things.

5 QUESTION: Yes, it's true that the Ninth Circuit
6 said just what you said it said, but it was quoting the
7 general requirement, I think, which exists in the way you
8 describe it. And here, I guess the question is, is given
9 their environmental assessment, had they failed to fulfill
10 that requirement and so it would require somebody to point
11 out to them, look at this environmental assessment. This
12 environmental assessment is not adequate to fulfill that
13 requirement that we all know exists. Now, what about
14 that?

15 MR. WEISSGLASS: The -- I'm not quite sure I
16 understand the question.

17 QUESTION: Remember, what we're talking about
18 now is the agency is considering alternative A, B, or C.
19 They all involve safety. They're likely to have
20 differential impacts on smoke and so forth. And now they
21 have in front of them an environmental assessment, and the
22 environmental assessment explains to them why they don't
23 have to do more than they've done in respect to just what
24 we're talking about. Everyone agrees that the requirement
25 is what you said. The Ninth Circuit says it. Who told

1 the agency that this EA is inadequate when it tells you
2 you don't have to do more in respect to that to assessing
3 one, two, and three, you know, et cetera.

4 MR. WEISSGLASS: The -- the agency --

5 QUESTION: I think that's --

6 MR. WEISSGLASS: -- issued the -- the
7 environmental assessment and then asked for comment on it
8 after it had already issued the interim final rules.
9 There were comments to the agency, and as I've said, they
10 didn't specifically say this. But the agency was
11 challenged in the Ninth Circuit and that issue was raised.
12 And that is enough because the -- the agency had before it
13 all the predicate facts to take into account the
14 relationship between the stringency of the safety rules
15 and the environment. It knew the effects of its actions.
16 It specifically said that high-risk trucks are both more
17 -- more polluting and less safe.

18 It had to do that. That's what NEPA requires.
19 NEPA doesn't require a citizen to come in and tell the
20 agency what its options are. It requires the agency to
21 take that action.

22 QUESTION: Does this agency have the authority
23 to exclude a perfectly safe truck because in its view it's
24 an older truck and will pollute more? Is that within the
25 scope of what the agency can do?

1 MR. WEISSGLASS: The agency is to make safety
2 choices.

3 QUESTION: Safety choices.

4 MR. WEISSGLASS: And in doing that it's -- under
5 NEPA must take a hard look at the environmental effect on
6 the safety choices.

7 QUESTION: No. It -- it has to describe the
8 environmental effects perhaps, but if -- if it does not
9 have any -- any power on the basis of environmental
10 effects to alter the safety regulations -- I mean, two
11 trucks are equivalently safe. Can this agency say, yes,
12 you're both just as safe, but as a safety regulator, I'm
13 not going to let you in because you pollute more? That
14 has nothing to do with the agency's job as -- as a safety
15 regulator.

16 MR. WEISSGLASS: The -- the agency is not
17 required to let any truck in. The agency is -- must
18 register --

19 QUESTION: That's true, but it has to exclude it
20 on the basis of safety considerations.

21 MR. WEISSGLASS: That is correct. And in
22 looking at the safety considerations, what it's going --
23 what it is going to promulgate for the broad class of
24 trucks, not each individual truck -- it is promulgating a
25 broad class of safety regulations. Any truck that meets

1 that standard, yes, the agency must let in. But in
2 deciding what that standard should be, that general
3 standard, the agency not only can, but has an obligation
4 to look at the environmental effects --

5 QUESTION: Are -- are you saying that because
6 there are varying environmental effects as between old
7 trucks and new trucks, the agency's obligation is to find
8 a safety hook in order to keep out the old rather than the
9 new?

10 MR. WEISSGLASS: The -- no. The agency does not
11 -- does not --

12 QUESTION: And we'll -- we'll find that the --
13 you know, the signal lights don't work quite so well on
14 the old trucks and we'll use that as a basis to keep them
15 out so there -- so we can minimize environmental damage?

16 MR. WEISSGLASS: The agency does not have that
17 obligation because NEPA does not require substantive
18 decisions. But what NEPA requires is that the agency take
19 a look at those effects.

20 QUESTION: All right. Then -- excuse me. Let
21 me -- let me ask you this question.

22 Let's assume the agency concluded that on all
23 significant safety factors, the old trucks are just as
24 good as the new trucks. It also concluded that the old
25 trucks pollute more. There -- there is an environmental

1 difference. The agency cannot keep out the old trucks for
2 that reason alone. My question is, does the agency have
3 to prepare an impact statement saying we're letting in the
4 old as well as the new, but in letting in the old, we're
5 letting in more highly polluting trucks? Do they have to
6 prepare that statement even though their action is, and
7 legally can be, the same with respect to the oldest of the
8 new?

9 MR. WEISSGLASS: Yes, as long as the agency has
10 -- has a significant choice to make about what the
11 standards should be.

12 QUESTION: Suppose under Justice Souter's
13 question, the agency has no choice and it must let in the
14 trucks. Does it still have to prepare the EIS?

15 MR. WEISSGLASS: If the agency has no choice --

16 QUESTION: Or the EA.

17 MR. WEISSGLASS: -- then -- then under a number
18 of circuit court cases, which the Government cited, the
19 agency would not have to do it. And that's an open
20 question for this Court, but the Court doesn't need to
21 reach it.

22 QUESTION: No. But you're -- you're saying, I
23 think, suppose the agency is trying to choose between two
24 headlight inspections a year or one. All right. Now, if
25 you have two a year, in fact, there will be fewer trucks.

1 If you go to one a year, there might be more trucks coming
2 in and then you will have more pollution.

3 Now, if that's a significant difference, then I
4 guess the agency does have to go into it. But if they
5 have an EA that tells them, you know, it's not that big a
6 deal because they're going to be about the same number of
7 trucks regardless, then I would think the burden would be
8 on the environmentalists to show that that's really wrong.
9 And I think that's the kind of argument you're making.
10 And you're telling me that it's so obviously wrong that
11 even though you didn't raise it in the agency, they should
12 have figured it out. Is -- is that where we are?

13 MR. WEISSGLASS: That -- I think that is
14 accurate about where we are. And -- and the fact is that
15 there were numerous comments to the agency about the
16 safety things that it should have done and didn't, and
17 there are numerous -- there's numerous -- there's a lot of
18 room between the standards that are being imposed on
19 trucks coming over the border from Mexico and the
20 standards that are in -- on U.S. trucks.

21 The agency could have made choices that would
22 affect this, that would affect the safety, and that would
23 also affect the environment. And the agency concedes
24 that. The agency concedes it had the discretion, and it
25 concedes that this could affect the environment.

1 What the agency does is say that that's all
2 about the President because the President lifted the
3 moratorium. But where that is a mistake is because
4 Congress was the -- was the body that said when trucks can
5 come over, and it gave both the President and the agency
6 separate authority over that. So it all goes back to
7 Congress in making this -- this foreign commerce decision.

8 Now, before I finish my argument, I did want to
9 talk about the Clean Air Act because this is very
10 important. Justice Souter raised this point. The way the
11 agency reads the regulations, it -- it would -- it would
12 be completely out of accord with the language of the
13 statute which --

14 QUESTION: Did -- did you challenge the regs?

15 MR. WEISSGLASS: We -- we did not challenge the
16 regs, but we read the regs --

17 QUESTION: Isn't that the end of the issue?

18 MR. WEISSGLASS: No, because we read the regs
19 very differently than the agency. The agency -- the --
20 the way the -- the particular regulation reads is that
21 it's not just where --

22 QUESTION: Where -- where are you? On 46?

23 QUESTION: 8a, page 8a, isn't it?

24 QUESTION: 46 of your brief or where?

25 MR. WEISSGLASS: Actually the -- the critical --

1 the critical regulation that the Government raised was in
2 its reply brief. It's on page 17 of the -- of the reply
3 brief.

4 And -- and there is the definition of continuing
5 program responsibility because once the -- the -- you get
6 past the cause point -- and EPA is very clear that under
7 the Clean Air Act, it's but-for causation. It says that.
8 And so we clearly have that here.

9 Then the question is whether the agency has a
10 continuing program responsibility. And there are two
11 sentences that are separate formulations of when there is
12 that responsibility. The -- the Government relies solely
13 on the first sentence, which we do not rely on. That's
14 when an agency requires some activities.

15 But the second sentence is the critical
16 sentence, which is when an agency, quote, takes actions
17 itself or imposes conditions that result in air pollutant
18 emissions. Well, in this case, the agency is -- is taking
19 action and imposing conditions that are going to result in
20 emissions because under 350, no trucks come in at all
21 until the agency makes these choices and because in making
22 the choices, it's imposing conditions that are going to be
23 absolutely determinative as to what the -- the pollutants
24 -- how much pollution there's going to be. If the agency
25 ratchets up its -- its controls, there's going to be less

1 pollution. The agency admits that.

2 QUESTION: I thought they were relying on the
3 regulation on page 8a of the Government's principal brief.
4 That's certainly what they raised in their -- in their
5 argument here, which -- which makes whatever this other
6 regulation says quite irrelevant because it's a definition
7 of emissions. And it says that to be an indirect emission
8 within the act, the Federal agency must have -- must be
9 able to practicably control and maintain control over the
10 emissions due to a continuing program responsibility.

11 MR. WEISSGLASS: That's right, and the
12 regulation I've just read is the definition of continuing
13 program responsibility. The agency clearly has a
14 continuing program responsibility here because as it's
15 enforcing the regs that it -- that it writes, it's going
16 to determine how much pollution there is. And it clearly
17 practicably controls the emissions because, as I said,
18 both without some choices, there's going to be no trucks
19 and once the agency makes the choices, those choices are
20 going to determine how much pollution comes in because
21 that's how many trucks and what type are coming in.

22 QUESTION: Well, I -- I guess that any -- any
23 Federal licensing agency for -- for automobiles or
24 anything else would -- would come within this and would
25 have to -- you know, if I don't issue a license, I can

1 practicably control the -- the amount of emissions, even
2 though the agency is not a -- an emissions approving
3 agency. It's -- it's giving driver's licenses.

4 MR. WEISSGLASS: The -- the -- this is the
5 tradeoff that Congress made in requiring States to meet
6 clean air requirements. It said, yes, we're going to --
7 we're going to take a stick to the States, as this Court
8 has said, but we're not going to make it more difficult as
9 a -- as a Federal agency for the States to meet its --
10 their responsibilities under the Clean Air Act. That
11 would be horribly unfair. And that's why the statute is
12 so broad that if the --

13 QUESTION: Thank you, Mr. Weissglass.

14 Mr. Kneedler, you have 4 minutes remaining.

15 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

16 ON BEHALF OF THE PETITIONERS

17 MR. KNEEDLER: Several things, Mr. Chief
18 Justice.

19 The -- the critical point here is that the
20 agency had no discretion to deny certification to Mexican
21 trucks that were eligible under -- under the President's
22 lifting of the moratorium if they satisfied the -- the
23 requirement that they'd be willing and able to comply with
24 the -- with the statutory standards. So the agency was
25 really acting under two imperatives. One is its

1 preexisting organic statute and then secondly, the
2 President's lifting of a moratorium that required the --
3 the Government to live up to its obligations under NAFTA.

4 QUESTION: What -- I'd like to hear your
5 response to the argument, which I didn't realize they were
6 making independently, that just based on the agency's
7 available choices, it could have made the safety -- have
8 different safety regulations. That was a sufficient
9 effect on the environment that they had to do a --

10 MR. KNEEDLER: They did not -- they did not --
11 what -- what they're really arguing is that the agency
12 should have considered some other alternative. The agency
13 analyzed essentially two alternatives, go forward under
14 our existing regulations -- again, these are procedural,
15 not substantive regulations, just regulations designed to
16 identify whether carriers satisfy substantive standards --
17 either to go forward under -- under preexisting or -- or
18 introduce new ones.

19 The respondents never said to the agency,
20 there's a third alternative. You can make your new
21 regulations even more stringent and here's what you could
22 do. And in fact, even now, they don't identify what
23 further strengths --

24 QUESTION: They're -- they're making basically
25 the argument you said they waived.

1 MR. KNEEDLER: Yes.

2 QUESTION: You know, I mean, that's been pretty
3 much our whole discussion. And I think on that, the
4 Government says, well, they're right in principle.
5 They're saying -- I mean, if in fact an agency has a
6 choice, A, B, or C, and if you choose A, there's a lot of
7 smoke; B, a little smoke; and C, no smoke, well, they
8 ought to go analyze it under an EIS. I think you agree
9 with that.

10 MR. KNEEDLER: But --

11 QUESTION: But you're saying, well, they never
12 made that point.

13 MR. KNEEDLER: Right.

14 QUESTION: They said, but it's so obvious we
15 didn't have to make it, and besides, when we got to the
16 Ninth Circuit, at least in the reply brief, we did make
17 it.

18 MR. KNEEDLER: Yes. Well, the important thing
19 is --

20 QUESTION: All right. So what's your response
21 to that?

22 MR. KNEEDLER: The -- the -- first of all, the
23 agency -- the agency did an EA in order to determine it
24 didn't have to produce an environmental impact statement.
25 If they were wrong on that, that should have been called

1 to their attention on this precise point, specifically
2 that the agency should have adopted an even more stringent
3 alternative. And it's -- and even now, they don't
4 identify one that the agency could do that wouldn't be --
5 essentially be a pretext, Justice Souter, as you were
6 suggesting, that would be consistent with their duty to
7 let in trucks and -- and still have -- have more
8 flexibility.

9 What they quote for this is on page 193 of the
10 joint appendix in the environmental assessment. It's
11 important to recognize that that is a portion of the -- of
12 the environmental assessment that repeats that our own
13 actions, including the inspections, are not going to have
14 a substantial impact on the environment. But even so, we
15 can -- we can mitigate that tiny impact, and it's in that
16 context where the agency says, we can try to screen out
17 the dirtier trucks. And there's a reference to
18 environment. It's unclear what it means, but I think two
19 pages later the court identifies that there could be leaks
20 from a truck that would be identified during an inspection
21 they could turn over to environmental people from the
22 State. So it's focused on a very narrow question, whether
23 -- whether the inspections would -- would increase the
24 emissions.

25 And respondents have never really challenged the

1 notion, which is what's being addressed here, that -- that
2 the increased inspections under these rules would have an
3 impact on -- on the environment.

4 I did want to address the -- the Clean Air Act
5 regulations. We did not raise the regulation that's
6 quoted on page 17 of our brief. We relied, as Justice
7 Scalia pointed out, on the -- under the indirect
8 emissions. As I mentioned, the -- the agency has no
9 continuing control. It isn't the control at the outset.
10 It's control over the subsequent activities, which is the
11 word in the regulation, and the -- this agency, a safety-
12 certifying agency, has no continuing control over where
13 these trucks will travel in the U.S., even whether the --
14 even whether the particular trucks come into the U.S. --

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Kneedler.

17 The case is submitted.

18 (Whereupon, at 12:03 p.m., the case in the
19 above-entitled matter was submitted.)

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